

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 11 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

HOVHANNES AGHABALYAN; et al.,

Petitioners,

v.

MICHAEL B. MUKASEY, Attorney
General,

Respondent.

No. 06-72186

Agency Nos. A79-544-300
A79-544-301
A79-544-302
A79-544-303

MEMORANDUM *

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted June 18, 2008**

Before: REINHARDT, W. FLETCHER, and CLIFTON, Circuit Judges.

Lead petitioner Hovhannes Aghabalyan and his family, natives and citizens of Armenia, petition for review of the Board of Immigration Appeals' ("BIA") order dismissing their appeal from an immigration judge's ("IJ") decision denying

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

their motion to reopen removal proceedings due to ineffective assistance of counsel. We have jurisdiction under 8 U.S.C. § 1252. Reviewing for abuse of discretion, *Siong v. INS*, 376 F.3d 1030, 1036 (9th Cir. 2004), we grant the petition for review and remand.

After the IJ denied Aghabalyan's applications for asylum, withholding of removal and protection under the Convention Against Torture, his former counsel filed an untimely notice of appeal with the BIA, and the BIA dismissed for lack of jurisdiction. Through new counsel, Aghabalyan then filed a series of motions to reopen claiming ineffective assistance of counsel. The BIA upheld the denial of Aghabalyan's last motion to reopen, stating that "[t]he period to appeal to this Board is jurisdictional, so equitable tolling based on a claim of ineffective assistance of counsel does not apply." The BIA is incorrect in stating that the untimely filing of a notice of appeal to the BIA cannot be excused by ineffective assistance of counsel. *See Siong*, 376 F.3d at 1038 (instructing the BIA to reopen proceedings where, *inter alia*, the failure to file a timely notice of appeal was obvious ineffective assistance of counsel).

We remand for the BIA to reconsider whether Aghabalyan's claim of ineffective assistance of counsel warrants reopening.

PETITION FOR REVIEW GRANTED; REMANDED.